PD-0244-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 8/14/2017 9:31 AM
Accepted 8/21/2017 2:23 PM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
8/21/2017
DEANA WILLIAMSON, CLERK

NO. PD-0244-16

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

ANDRE JAMMAR ASH
Appellant
v.
STATE OF TEXAS
Appellee

APPELLANT'S MOTION FOR REHEARING

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Pursuant to TEX. R. APP. P. 79.2, Appellant files this Motion for Rehearing.

I.
PROCEDURAL HISTORY

The State of Texas indicted Mr. Ash for the offense of Possession of a Controlled Substance, Cocaine, over four grams but less than 200 grams (enhanced).[1] A trial was held beginning on December 2, 2014 with the Honorable Judge Robert Stem, presiding. The jury returned a verdict of guilty.[2] The punishment proceedings were tried to the court. A sentence of 35 years in the Texas Department of Criminal Justice, Institutional Division, and a fine of $5000.00 was handed down in open court on December 11, 2014.[3] The trial court certified Appellant's right to appeal his conviction.[4] Appellant timely filed the Notice of Appeal on December 19, 2014.[5] This Court granted the Appellant's petition for discretionary review on September 14, 2016. On June 28, this Court denied affirmed the court of appeals, and denied relief to Appellant.[6]

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1 (I C.R. at 6).

2 (I C.R. at 21).

3 (I C.R. at 26).

4 (I C.R. at 25).

5 (I C.R. at 35).

6 *Ash v. State*, No. PD-0244-16, 2017 WL 2791727, at *6 (Tex. Crim. App. June 28, 2017).

II.
ARGUMENT

> Because the witnesses in this case were not charged with the same offense as Ash or a lesser-included offense, and the evidence was not uncontradicted or so one-sided that a rational jury would have had to believe that the witnesses were accomplices, we agree with the court of appeals that Ash was not entitled to accomplice-as-a-matter-of-law instructions.[7]

> The Court has often recognized the "fundamental importance" of stare decisis, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. The Court has pointed out that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Stare decisis thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.[8]

This Court made a similar statement recognizing the "importance of the principle of stare decisis, and reaffirming its commitment to adhering to precedent.[9] However, this Court's opinion in *Ash* failed in both the recognition and adherence to precedent. Secondly, this Court's narrowing of the accomplice witness rule is out of step with

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7 *Ash*, 2017 WL 2791727 at *6.

8 *Randall v. Sorrell*, 548 U.S. 230, 243–44 (2006) (internal citations omitted).

9 *Blake v. State*, 971 S.W.2d 451, 459 (Tex. Crim. App. 1998) (en banc).

current legislative actions taken to guarantee an expansion of focus on questionable testimony, and thereby risking an increase in the rate of false convictions. Appellant will discuss these issues in this order.

A. This Court's holding in Ash.

This Court, citing decades of case law "confusion," found that an instruction on a witness as an accomplice as a matter of law lies solely in the following situations: (1) if the witness has been charged with the same offense as the defendant or a lesser-included offense; (2) if the State charges a witness with the same offense as the defendant or a lesser-included of that offense, but dismisses the charges in exchange for the witness's testimony against the defendant; and (3) when the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that the witness was not an accomplice.

B. The Ash court's failure to follow precedent.

Accomplice testimony in a criminal trial is highly relevant and often essential in the prosecution of crime. Given an accomplice's obvious motive to tailor their testimony to satisfy the prosecutor, such testimony is "quite often" of questionable reliability.[10] The policy behind the instruction is obvious: to alert the jury to the

[10] Clifford S. Fishman, *Defense Witness as "Accomplice": Should the Trial Judge Give a "Care and Caution" Instruction?,* 96 J. CRIM. L. & CRIMINOLOGY 1, 2 (1996).

possibility of perjured testimony. When an accomplice testifies for the prosecution, he may have an interest in lying in favor of the prosecution to obtain favors or even immunity.[11] In short, an accomplice's credibility "may be suspect."[12]

Accordingly, lawmakers have sought to safeguard against false convictions based on such testimony.[13] A substantial number of American jurisdictions require a trial judge to give a special jury instruction when an accomplice testifies as a prosecution witness.[14] Among jurisdictions with a corroboration requirement, the prevailing view is that the state must introduce evidence independent of accomplice testimony that "tends to connect the defendant with the commission of the crime."[15] This court, by ignoring its own existing precedent, has now placed Texas into the minority of states restricting this instruction.

Instead of the claimed "confusion" surrounding the applicable law,[16] this Court has previously stated the case law "clearly defined who is subject to the accomplice

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11 *United States v. Nolte*, 440 F.2d 1124, 1126 (5th Cir. 1971).

12 *Id.*

13 *Id.*

14 Fishman, supra at note 10, at 5. Indiana seems to be the outlier on this issue, where no instruction is required. See *Newman v. State*, 334 N.E.2d 684, 688 (1975); *Johnson v. State*, 832 N.E.2d 985, 1001 (Ind. Ct. App. 2005).

15 *See* CLIFFORD S. FISHMAN, 1 JONES ON EVIDENCE § 5:54 (7th ed. Supp. 2005) (citing numerous state statutes and court decisions using this phrase or minor variations thereon).

16 *Ash*, 2017 WL 2791727, at *4.9

witness rule."[17] The *Blake* court held that to obtain an instruction on an accomplice as a "matter of law," it was necessary to show: (1) an affirmative act or omission; (2) that the person could be prosecuted for the same offense as the defendant or a lesser included offense.[18] This is the precise test set forth in the last decided case concerning the mechanism to determine whether an accomplice witness at law prior to *Ash*.[19] In fact, the last decided case by an appellate court, in light of contradictory precedent, is itself precedent.[20]

Subsequent case law has not made *Blake* or *Zamora* "a legal anomaly or otherwise undermined its basic legal principles."[21] As such, no reason existed to uproot decades of case law,[22] merely to make obtaining such an instruction nearly impossible. As one of this Court's obligations is to "promote the fair administration of justice by trial and appellate courts throughout Texas,[23] it can be questioned on how *Ash* forwards this goal. As Judge Baird questioned in dissent, "[h]ow can the

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17 *Blake*, 971 S.W.2d at 454.

18 *Id.* at 454–55.

19 *Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013).

20 *Giddings v. City of San Antonio*, 47 Tex. 548, 558 (1877)

21 *Sorrell*, 548 U.S. at 244.

22 *Id.*

23 *Arcila v. State*, 834 S.W.2d 357, 361 (Tex. Crim. App. 1992) *overruled on other grounds by Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997).

majority place its stamp of approval on an analysis which fails to follow our precedent? Such action . . . most certainly does not "promote the fair administration of justice."[24] Appellant urges that this Court grant rehearing on this matter.

C. The trend in the law is to strengthen criminal justice protections from wrongful convictions.

Despite centuries of acknowledgment of the untrustworthy nature of accomplice testimony, this Court's newly minted test to define who is an accomplice at law will make it easier for a camel it is easier to go through the eye of a needle[25] than for someone facing this issue at trial to have a witness declared an accomplice at law. As such, this Court increases the opportunity for wrongful convictions.

1. The accomplice witness rule at common law.

The history of the snitch is long and inglorious, dating to the common law. In old England, snitches were ubiquitous.[26] Their motives, then as now, were unholy. At early common law accomplices were deemed competent accusers in appeals of felony and were either pardoned as a matter of law upon the defendant's conviction,

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[24] *Id.* at 368 (Baird, J. dissenting).

[25] *Matthew* 19:24

[26] Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System – A Center on Wrongful Convictions Survey* 2 (2004), http://tinyurl.com/yd7peept.

or executed upon his acquittal.[27] The practice, known as "approvement," fell into disuse around 1500 because conditioning the accomplice's pardon upon the conviction of the defendant was thought to be so conducive to perjury as to outweigh its value as an incentive to "squealing."[28]

To meet the needs of criminal law administration, the practice of turning king's evidence then evolved.[29] This differs from approvement in that the accomplice witness is granted a right to pardon conditioned not upon the defendant's conviction but upon the accomplice's testifying fully and fairly.[30] The practice of turning king's evidence was apparently first challenged in the treason trials of the seventeenth century, in which accomplice testimony given under promise of pardon was held competent though of diminished credibility.[31]

The eighteenth and nineteenth centuries saw this rule, born in the labor of political turbulence, consolidated with little question into the texts on criminal law,

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27 Note, *Accomplice Testimony under Conditional Promise of Immunity*, 52 COLUM. L. R. 138, 139 (1952).

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

evidence, and procedure most influential on American law.[32] With only but a superficial examination of the English common law cases, American decisions have unanimously followed the rule of the English treason trials, adapting it to cover not only promises of pardon but also bargains for leniency and immunity from prosecution.[33]

As of today, the accomplice witness rule is not mandated by common law or the federal constitution.[34] The rule reflects a legislative determination that accomplice testimony implicating another person should be viewed with a measure of caution, because accomplices often have incentives to lie, such as to avoid punishment or shift blame to another person.[35]

2. The Legislature has strengthened the law concerning snitch testimony.

False testimony from jailhouse informants has been the single biggest reason for death-row exonerations in the modern death-penalty era, according to a 2005

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32 *Id.*

33 *Id.* at 139–40.

34 *Blake*, 971 S.W.2d at 454.

35 *Id.*

survey by the Center on Wrongful Convictions.[36] They accounted for 50 of the 111 exonerations to that point, and there have been 48 more exonerations since then.[37]

The Texas legislature has taken note of this issue. Last month, the Texas Legislature, apparently acknowledging this State's history of being a "minefield of wrongful convictions – more than 300 in the last 30 years alone –[38] passed the most comprehensive effort yet to rein in the dangers of transactional snitching.[39] The new law requires prosecutors to keep thorough records of all jailhouse informants they use — the nature of their testimony, the benefits they received and their criminal history.[40] This information must be disclosed to defense lawyers, who may use it in court to challenge the informant's reliability or honesty, particularly if the informant has testified in other cases.[41] The law was recommended by a state commission

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36 *The Snitch System – A Center on Wrongful Convictions Survey* at 3.

37 *Id.*

38 Editorial, *A Crackdown on the Market for Snitches,* N.Y. TIMES July 16, 2017 at SR 10 (hereinafter "Editorial").

39 H.B. 34 85th Leg., R.S. (eff. Sept. 1, 2017). Governor Greg Abbott signed this bill into law on June 2, 2017.

40 Editorial at SR 10.

41 *Id.*

established in 2015 to examine exonerations and reduce the chances of wrongful convictions.[42]

The commission also persuaded lawmakers to require procedures to reduce the number of mistaken eyewitness identifications and to require that police interrogations be recorded.[43] The 2017 legislative actions follow other significant steps taken in recent years, such as requiring corroboration from a witness who "was imprisoned or confined in the same correctional facility as the defendant"[44] or toughening the admission of certain forensic analysis of evidence.[45]

But with this decision, this Court takes flight in the other direction from acknowledging the perils of accomplice witness testimony. The same dangers that exist from using jailhouse snitches arise from the use of accomplice witness testimony. It is doubtful these dangers are apparent to the general public and thus a juror must be told to view such evidence with great caution.

Furthermore, placing a requirement that an accomplice as a matter of law be found only when there is "when the evidence is uncontradicted or so one-sided that

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42 *Id.*

43 *Id.*

44 TEX. CRIM. PROC. CODE ANN. art. § 38.075 (West 2009).

45 *See, e.g.* Acts 2015, 84th Leg., ch. 1276 (S.B. 1287), §§ 8, 9, eff. Sept. 1, 2015.

no reasonable juror could conclude that the witness was not an accomplice"[46] provides the State with the tools to game the system to obtain a wrongful conviction. For instance, in a situation to where the State defers a decision to charge a cooperating defendant prior to their testimony, this the defense is then left with the imposition of the apparent beyond the "beyond a reasonable doubt standard" for labeling a person an accomplice at law.

D. Conclusion.

In closing, Appellant urges that this Court reverse its prior opinion. This State's consistent law did not require wholesale change, especially in a manner that favors exclusion of this vital instruction to the jury. Moreover, the decision in *Ash* is clearly contrary to the legislature's policy against the improper use of snitch testimony in a criminal trial. This decision hands the State of Texas the keys to manipulate the system to ensure that the jury will never hear that a witness is an accomplice as a matter of law.

A reversal is "certainly [required] if we are to continue to maintain that our system of criminal justice, if not favoring the accused, at least keeps the scales evenly balanced in his contest with the state. Justice is well served when prosecution and

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[46] When not charged with or having charges dismissed as result of the testimony. *Ash*, 2017 WL 2791727 at *6.

defense are evenly matched . . . [but can Texas] boast of a decent administration of the criminal law if we don't provide some redress against his hard reality? "[47] Or "shall we continue to regard the criminal trial as in the nature of a game or sporting contest and not a serious inquiry aiming to distinguish between guilt and innocence?[48]

PRAYER FOR RELIEF

Ms. prays that this Court grant his motion for rehearing, reverse this matter, and remand for a new punishment trial, or for whatever relief he may be entitled.

Respectfully submitted,

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[47] William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. Q. 279, 285–86 (1963).

[48] *Id.* at 279.

CERTIFICATE OF SERVICE

A copy of this Petition for Discretionary Review has been delivered to the State Prosecuting Attorney, attorney of record for the State of Texas, at P.O. Box 12405, Austin, Texas, 78711, by first class mail or by electronic mail and the Falls County District Attorney's Office, Marlin, Texas, by this Court's electronic filing system.

Signed August 14, 2017.

/s/ Stan Schwieger

Stan Schwieger

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of TEX. R. APP. P. 9.4(i) because this brief contains 2491 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1)

2. This brief complies with the typeface requirements and the type style requirements of TEX. R. APP. P. 9.4(e) because this brief has been produced on a computer in conventional typeface using WordPerfect X7 in Times New Roman 14 point font in the body of the brief and Times New Roman 12 point font in the footnotes.

/s/ Stan Schwieger

Stan Schwieger